

dayparts of noncommercial programming from a variety of channels, or to choose an optimal mix of these options in reaching the 4% cumulative exhibition hour obligation.

In many cases, educational or informational programming will be provided to DBS providers in the form of discrete programming blocks. In such situations, the provider will function as a programmer to the extent that schedules these discrete blocks of programming on available channels. A cumulative hour measurement will allow such a DBS provider to program dayparts in a manner which maximizes the appeal and availability of different types of public service programming to target audiences. Thus, instead of merely relegating all noncommercial public service programming to possibly unwatched 24-hour PEG access-type channels to meet the requirement, a DBS provider/programmer can identify peak viewing hours for various types of noncommercial programming, and can spread programming hours across different channels and dayparts as appropriate in order to maximize the programming's exposure to a receptive audience. Moreover, the provider can do so in a manner consistent with its overall marketing and packaging strategies in connection with other programming and services. By matching viewership and usage with programming, the DBS operator can thus make optimum use of its satellite resources, which helps ensure its commercial viability as an MVPD.

In arrangements in which DBS providers do not exercise control over the programming, the cumulative hour measurement still provides the DBS provider with the opportunity and incentive to negotiate with a much larger pool of programming suppliers in fulfilling the public interest requirement, and to encourage such programmers to build quality noncommercial public interest programming into their service offerings so that the DBS provider can gain credit in fulfilling its public interest obligation. For example, DirecTv and The Learning Channel have agreed that the latter will provide a commercial-free block of daily educational programming targeted at elementary-school-aged children. The cumulative hour approach allows DirecTv to count this time towards meeting its public service obligations, and in turn gives DirecTv tremendous incentives to seek similar

agreements from other programmers who may also have access to quality noncommercial program offerings.^{28/}

Finally, regardless of what measure of channel capacity that the Commission ultimately adopts, DirecTv strongly urges that the 4% carriage obligation come into effect nine months from the date of commencement of its DBS service. DirecTv and any other DBS provider will need at least this amount of time to identify sufficient programming, enter into any necessary agreements for its carriage, and to determine the optimal manner in which such programming can be integrated into its DBS service offering.^{29/}

B. Responsibility for Programming

Section 25(b)(3) mandates that no editorial control should be exercised by a DBS provider over the noncommercial programming aired. Given this requirement, which explicitly eliminates any ability of DBS providers to influence the content of such programming once it is selected for distribution, the Commission's decision to exempt DBS providers from liability for harm caused by programming over which they have no control is absolutely necessary. As the Commission observes, such an approach is consistent with Section 315(a) of the Communications Act, which prohibits broadcast licensees from censoring material aired by political candidates. A similar approach is required and must be applied in this instance as well. See Farmer's Educational Cooperative Union of America v. WDAY, Inc., 360 U.S. 525 (1959).

C. Definition of "National Educational Programming Supplier"

Section 25(b)(3) requires that a DBS provider shall meet the requirements of the statute by making its channel capacity available to "national education programming suppliers."

^{28/}

^{29/} In any event, however the Commission determines the capacity requirement, it should recognize that the DirecTv system will be launched on two separate satellites. DirecTv will have only a 44 CE system until its second satellite is launched.

In interpreting this provision, it is crucial to remember that Section 25(b)(3) is a subset of Section 25(b)(1)'s obligation for DBS providers to carry certain kinds of noncommercial programming. Specifically, Section 25(b)(1) mandates that DBS providers reserve channel capacity for noncommercial programming of an educational or informational nature.^{30/} On its face, this language plainly contemplates that DBS providers should be permitted to choose from a wide array of qualified programming, that is, noncommercial programming that may be educational or informational in nature.

As evidence of this intent, the Commission appropriately points to the House Report on the Cable Act, which served as the basis for Section 25, and which was cast in terms of various types of enumerated noncommercial "public service uses." These uses were defined to include 1) programming produced by public telecommunications entities, including independent production services; 2) programming produced for educational, instructional or cultural purposes; and 3) programming produced by any entity to serve the disparate needs of specific communities of interest, including linguistically distinct groups, minority and ethnic groups, and other groups.^{31/} The Conference Report adopted this language as well.^{32/} Although the Commission correctly notes that the definition of "public service uses" was not retained in Section 25(b) as finally passed, Congress retained the reference to "informational programming" in the key provision imposing the programming requirement. The legislative history thus provides useful insight into the types of programming that were intended by Congress to meet the requirement.

^{30/} The Commission has not focused on the possible importance of the disjunctive "or" in the statute, and indeed, has not quoted accurately the statutory language in the Notice. The Commission seeks comment on the definition of the term "educational and informational programming." Notice at ¶ 44. This could be more than mere semantics and could make a real difference if a DBS provider wishes to fulfill its public service obligation by offering noncommercial informational programming.

^{31/} See House Report at 124.

^{32/} See Conference Report at 100.

This means that the Commission should not and cannot read Section 25(b)(3), which specifies that DBS providers shall meet their statutory requirements by making channel capacity available to "national educational programming suppliers," to mean that such suppliers are the exclusive pool from which DBS providers may draw programming to satisfy their public service obligations. DirecTv is, of course, committed to offering programming by national educational programming suppliers to its customers. But while Section 25(b)(3) clearly requires that DirecTv carry such programming on nondiscriminatory terms and conditions, the provision should not be read to require that DirecTv carry only that class of noncommercial programmer. In addition to noncommercial "educational" programming, DirecTv also wishes to offer noncommercial "informational" programming to its customers, as well as noncommercial educational programming that may be provided by sources other than national educational programming suppliers. The Commission should not read the statute in a manner that constrains DirecTv's ability to choose from the widest possible menu of qualified programming in fulfilling its obligations.

Under DirecTv's interpretation, varied and interesting providers of noncommercial educational or informational programming can and will be carried on the DirecTv DBS svstem. The

provision of quality educational programming, much of it noncommercial in nature -- programming that is precisely of the type that should count towards satisfying a DBS provider's public service programming obligations. DirecTv intends to carry such programming, and it should "count" towards satisfying the exhibition-hour goal discussed above.

In sum, the phrase "noncommercial programming of an educational or informational nature" is the heart of the carriage obligation imposed by Section 25(b). Noncommercial educational or informational programming that airs on DBS systems should be counted towards fulfilling DBS providers' public service obligations, even if such programming is not directly provided by a "national educational programming supplier."

In any event, DirecTv urges the Commission to construe the definition of "national educational programming supplier" itself broadly. As mentioned, such suppliers will be carried, and will provide valuable public service offerings to DBS. The scope of the Commission's definition should maximize the diversity provided by such offerings. In this regard, DirecTv supports the Commission's proposed incorporation of the Section 397 definitions of "noncommercial educational broadcast station," "public broadcasting entity," and "public telecommunications entity."^{34/} These definitions are relatively broad, and incorporating them into the Section 25 definition will enhance DBS providers' ability to choose from a diverse menu of programming in meeting their public interest obligations.

D. Definition of "Noncommercial Educational and Informational Programming"

As set forth above, Section 25(b)(1) requires that a portion of a DBS provider's total channel capacity be reserved exclusively for noncommercial programming of "an educational or informational nature." Because Section 25(b)(1) is the key provision of the statute with respect to the

^{34/} See Notice at 9 n.16.

carriage of public service programming, DirecTv believes that the Commission should interpret that section as set forth above.

E. Unused Channel Capacity

Section 25(b)(2) of the Act permits a DBS provider "to utilize for any purpose any unused channel capacity required to be reserved . . . pending the actual use of such channel capacity exclusively for noncommercial programming of an educational or informational nature." DirecTv supports this concept, since it obviously is a policy that maximizes and promotes efficient use of the DBS provider's spectrum. This provision goes hand in hand with DirecTv's proposal for a nine-month grace period to reach the 4% level beginning from the date of DBS service commencement. DirecTv's vision is to embrace its statutory obligations, to phase in the public service programming, and to package such programming attractively.

F. Rates

As the statute and the legislative history make clear, Section 25(b)(4) of the Act implements a "pricing structure that was devised to enable national educational programming suppliers to utilize [a DBS provider's] reserved channel capacity."^{35/} The statute directs the Commission, in determining reasonable prices, to consider:

the non-profit character of the programming provider and any federal funds used to support the programming such as programming funded by the Corporation for Public Broadcasting or other federal agencies. Prices to such national educational programming suppliers are not to exceed 50 percent of the total direct costs of making a channel available, and direct costs are to exclude marketing, general administrative and similar overhead costs, as well as costs associated with lost profits.^{36/}

Thus, by its terms, this part of Section 25 is applicable only to that channel capacity that DBS providers are obligated to make available on a nondiscriminatory basis to "national educational

^{35/} Conference Report at 100; see Section 25(b)(4) (expressly determining "reasonable prices under paragraph 3," i.e., reasonable prices offered to "national educational programming suppliers").

^{36/} Conference Report at 100.

programming suppliers." It does not by its terms apply to other educational or informational programmers whose programming may satisfy the section 25(b)(1) obligation, but that is not offered by "national educational programming suppliers."

In determining the appropriate rates to be charged to national educational programming suppliers, DBS providers should be able to incorporate the primary costs of launching and distributing their DBS services. Among the elements that should be includable in a DBS provider's direct cost base are:

1. Costs of receiving program providers' signals at the DBS provider's uplink facility;
2. Costs of uplinking the signal, including continuing costs of operating and maintaining the uplink facility;
3. Personnel and administrative costs related directly to the carriage of programming offered by national educational programming suppliers;
4. Costs of construction, launch, operation and insurance of the satellite and the uplink facilities; and
5. Costs associated with the packaging and distribution of noncommercial services, including conditional access and billing.

Having identified certain costs that should in part be properly recoverable under Section 25, DirecTv nevertheless strongly agrees with the Commission's view, in the last paragraph of the Notice, that the assumption underlying Section 25(b) with respect to reasonable rates and costs presents an incomplete picture of how DBS providers in general and how DirecTv in particular are likely to satisfy their public interest obligations. Section 25(b)(4) applies only to that limited situation under the statutory scheme where national educational programming suppliers lease reserved capacity from DBS providers. But as DirecTv has pointed out above and as the Commission has recognized, "[t]his type of arrangement . . . may not be the only way such channels are provided. For example,

DBS providers may pay a program supplier for the use of its programming or may undertake various promotional activities in exchange for other consideration.^{37/} This is in fact how DirecTv primarily intends to meet the obligations set forth in Section 25. DirecTv intends to select varied and interesting noncommercial or informational programming and to provide it as an integrated part of the DirecTv service. All parties subject to or affected by the Section 25 of the statute will be best served by arrangements in which DBS providers are actively involved and have a significant interest in ensuring the highest possible viewing audience in conjunction with the integration of public service programming into their service packages.

V. CONCLUSION

DBS has vast potential to provide a wide spectrum of public service uses and programming to the public apart from the provision of mere entertainment programming. DirecTv has proposed a vision, consistent with Section 25's mandate and statutory scheme, by which DBS providers can maximize DBS's public service potential by integrating -- and not isolating -- quality noncommercial educational or informational programming into their service offerings. By adopting a regulatory approach that ensures DBS providers the discretion and flexibility to choose from the widest possible pool of qualified programming in meeting their obligations, the Commission will encourage DBS providers like DirecTv to actively promote and package such programming in a


^{37/} Notice at ¶ 51.

fashion that will increase its appeal and distribution to the widest possible spectrum of DBS providers' viewership.

Respectfully submitted,

DirecTv, INC.

By:


Gary M. Epstein
James H. Barker

LATHAM & WATKINS
Suite 1300
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 637-2200

Its Attorneys

•